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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 627

FRANK E. MONDAY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner and plaintiff below prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above cause on June 3, 1959.

Opinions Below

The opinion of the United States Court of Claims is set forth on pages 9-11 of the Appendix to this petition.

Jurisdiction

The judgment of the United States Court of Claims was finally entered on October 7, 1959. The jurisdiction of the Court is invoked under Section 1255 of U.S.C.A. as amended by the Act of September 1, 1948.

Questions Presented

This case involves three questions. First, whether the letter of decision (dated March 13, 1956) by the Agency notifying the petitioner here as employee was procedurally defective since it did not contain findings regarding the charges preferred. Second, whether the failure of the Agency to make available to the petitioner here as employee at the Grievance Hearing all documents on which the personnel removal charges were based, was a violation of the due process clause of the 5th Amendment of the Constitution of the United States. Third, whether the Court of Claims erred in holding that the fifty day period from the date of the final decision of the Agency to the date of filing of employee's appeal with the Civil Service Commission was a bar to review although the Civil Service Commission was willing to waive the ten day limitation appeal period and consider the fifty day period as timely because of lack of notice to the employee of his appeal rights had the employee not been considered guilty of laches by the Commission.

Statutes and Regulations Involved

The pertinent statute and regulations are the following:

a) Statute

5 USCA Sec. 652(a)

"No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer."

b) Regulations

5 Code Fed. Regs. Sec. 9.102(a)(1)

"* * * If the employee answers the charges, his answer must be considered by the agency. Following consideration of the answer, the employee shall be furnished at the earliest practical date with a written decision. If the agency determines that removal or other action is warranted, the employee shall be notified in the decision of the reasons for the action taken and its effective date."

5 Code Fed. Regs. Sec. 9.106(b)(3)

"No case will be investigated under this paragraph unless the request for such investigation is received by the Commission within ten (10) days after the effective date of separation, suspension, reassignment or demotion. This time limit may be extended in the discretion of the Commission only upon a showing by the employee that circumstances beyond his control prevented him from filing a request for an investigation within the prescribed ten (10) days. * * *"

Statement of the Facts

Petitioner was employed as a civilian classified status employee of the Department of the Air Force from 1949 to March 16, 1956, when he was removed from his position as an Air Intelligence Research Analyst GS-7. He appealed the removal action though the Agency Grievance procedure and on March 4, 1957, he received a final decision from the Department of the Air Force affirming his removal. Although petitioner was not informed of his right of appeal to the United States Civil Service Commission, he filed an appeal with the Commission 50 days later on April 23, 1957.

On May 1, 1957, the Commission advised in a decision by the Appeals Examining Office that the 10 day limitation period could be waived for a circumstance beyond the control of the appellant and the petitioner's failure to be notified of his right to appeal to the Commission

could be considered such a circumstance. However, the Commission ruled the petitioner was guilty of laches because the Commission found the lapse of time was to run from March 16, 1956, the date of petitioner's termination of employment rather than from March 4, 1957, the date of the final decision by the Agency.

Petitioner appealed to the Board of Appeals and Review which Board refused to grant the appeal, thus affirming the action of the Appeals Examining Office in the Board's decision of May 17, 1957.

On September 17, 1957, petitioner filed his action in the Court of Claims seeking to recover back pay from March 16, 1956, based on 28 U.S.C. Sec. 1491.

Argument

1. ***The decision of the Agency to dismiss petitioner was procedurally defective and is subject to Mulligan v. Andrews.***

In *Mulligan* v. *Andrews*, 211 F (2d) 28 (1954) the United States Court of Appeals for the District of Columbia held that a decision of an Agency to remove an employee after charges have been preferred and an answer to the charges has been filed by the employee, must disclose which of the charges if any brought by the agency are relied on for removal. The Court held that "only findings upon such charges, specifically identified, can constitute the reason required in the adverse decision." In the *Mulligan* case the letter of decision from the Agency to the employee stated that the employee was found unsuitable and the decision made no statement whether the specific charges were sustained. See also *Kutcher* v. *Higley* 235 F (2d) 505 (CCA-D.C. 1956)

In the instant case the letter of decision by the Agency of March 13, 1956 contained no statement therein advising that the Agency had sustained the charges against the petitioner. Petitioner was merely told that his replies

were not considered a satisfactory explanation of the charges that his work had been deficient in both quantity and quality. This statement was made in the third paragraph of the letter of decision dated March 13, 1956 while in the first paragraph thereof was the following statement: "You are hereby notified that final decision has been made to remove you from the service, effective 16 March 1956. It has been determined that your removal is for such cause as will promote the efficiency of the service."

Under these circumstances, it is submitted that the removal of the petitioner by the Agency may have been for some other reason than that indicated in the original charges. It is noteworthy that the Government in its reply brief in the Court of Claims in paragraph five thereof referred to an alleged falsification by petitioner of a Form 57 filed with the Department of the Air Force.

In view of the number of specific allegations of inefficiency made by the Agency in the original charges, it was mandatory for the agency to advise petitioner what allegations made by the Agency, all or part thereof, were sustained in the findings of the Agency after reviewing petitioner's reply to the original statement of charges.

The decision of the U. S. Court of Appeals in *Green* v. *Baughman* 243 F. (2d) 610, certiorari denied, 355 U.S. 819, is not applicable to the factual situation here, since in the *Green* case the agency in its letter of removal referred to the fact that the charges were sustained. The Court said at p. 612, "We think direct references to the charges as sustained was a sufficient statement of the reasons for the discharge."

Petitioner submits that failure of the Agency to make a finding with respect to the charges brought by the Agency following petitioner's reply thereto was a procedural defect. Orderly administrative procedure requires that after extensive charges are made, and reply

by the employee to the charges is made, a finding with respect to the charges is mandatory to meet the requirements of Section 9.102(a)(1) of the Civil Service Regulations (5 CFR Sec. 9.102(a)(1)) that the decision must contain the reasons for the removal.

2. The denial of documents to petitioner and his counsel by the Agency was contrary to the due process clause of the 5th Amendment.

Petitioner was denied access to certain of the documents which the Agency alleged were inefficiently processed by the petitioner. Some of the documents had been destroyed or were not available to petitioner at the time that he filed his reply to the charges. By affidavit attached to his reply brief in the Ct. of Claims petitioner has stated that full records pertaining to the charges were not made available to him and to his counsel. Of a total of 64 documents only 11 of the documents were made available at the time of the grievance hearing to petitioner and his counsel.

Charges based on evidence not produced for examination of petitioner and his counsel violate the due process clause of the 5th Amendment. It was impossible for petitioner and his attorney to defend against allegations of improper processing of documents withheld from their examination. Even should it be true that these matters were of a confidential nature, it does not excuse the failure of the Government to confront the employee with the evidence on which his discharge was based. There are no exceptions under the Lloyd-La Follette Act, as amended, 5 USCA 652(a), which permit the Agency to penalize an employee on the basis of secret evidence withheld from the employee. Petitioner was entitled to have the documents which were the subject of the charges brought forward at the time the charges were filed so that petitioner might make an adequate reply and the documents should have been brought forward at the hearing so he

and his counsel could have reviewed this evidence at the hearing and made the evidence the subject of cross-examination. If the Agency did not wish to make the documents available, the charges based on these documents should have been withdrawn. See *Jencks* v. *United States* 353 U.S. 657.

3. Petitioner was not guilty of laches; the Civil Service Commission expressed a willingness to waive the ten day limitation period as petitioner was never notified of his right of appeal to the Commission.

As Government's Exhibit #12 in the Court of Claims is a letter from E. A. Dunton, Chief Appeals Examining Office, U. S. Civil Service Commission, dated May 1, 1957, addressed to Herbert S. Thatcher, Esq., then counsel for the petitioner. In the letter, Mr. Dunton was willing to concede that the Agency's failure to notify petitioner of his appeal rights to the Civil Service Commission was a circumstance beyond his control and therefore was a basis for waiving the ten day limitation period on appeals from the Agency to the Civil Service Commission. But the Commission through Mr. Dunton ruled that the petitioner was barred by laches because the Commission considered the ten day period would commence to run from the termination of employment date of March 16, 1956 rather than from the date of the final decision of the Agency's grievance procedure of March 4, 1957 (Government's Exhibit in Court of Claims #9).

If the provisions of Section 9.106(b)(3) of the Code of Federal Regulations for the Civil Service Commission (5 CFR, Part 9, 1949 ed.) are interpreted in the light of orderly administrative procedure the ten day period referred to should be computed from the date of *final* action of the Agency separating the employee. Thus, it is submitted that the Commission erred in holding that plaintiff was guilty of laches and it is noted that the Court of Claims has considered the time for filing an appeal to

run from March 4, 1957. However, the Court below has made the fifty day period from March 4, 1957 to April 23, 1957, the date that petitioner filed the appeal with the Commission, a matter of bar to petitioner's right of review although the Commission indicated it would waive the ten day period and accept the appeal within the fifty days because of lack of notice.

Thus it is submitted that petitioner was not guilty of laches (which was confirmed by Government in its reply brief under paragraph 5 in the Court of Claims) and the petitioner was not barred from review by the Commission and the Court below, since the Commission was willing to waive the ten day requirement because of the lack of notice to the petitioner of his right of appeal but the Commission erroneously considered petitioner guilty of laches based on a mistaken computation of time from March 16, 1956 instead of March 4, 1957.

Conclusion

Wherefore, petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause directed to the United States Court of Claims and upon such review the judgment of said Court of Claims be vacated, reversed and set aside, and that this case be remanded to said Court with instructions to proceed in accordance with the views of this Court.

David M. Klinedinst
Attorney for Petitioner

IN THE UNITED STATES COURT OF CLAIMS

No. 439-57

(Decided June 3, 1959)

FRANK E. MONDAY v. THE UNITED STATES

Mr. David M. Klinedinst for the plaintiff. *Mr. Joseph G. Weeda* was on the brief.

Mr. Francis J. Steiner, Jr., with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

BRYAN, *District Judge*, sitting by designation, delivered the opinion of the court:

Discharged on March 16, 1956, for inefficiency, as a civilian employee of the Department of the Air Force, the plaintiff seeks payment of his salary from that date, on the averment that his dismissal was unlawful. The illegality, he says, consisted of the defectiveness of the removal procedure, arbitrariness and capriciousness in the decision, and a violation of the Performance Rating Act of 1950, post. Cross-motions for summary judgment tender the issue; we think the defendant should prevail.

Contrary to the suggestion of the plaintiff, the record clearly discloses that the Government acted under the Lloyd-La Follette Act of 1912, as amended, 5 USCA 652(a),* rather than in pursuance of the Performance

* The pertinent terms are these:

No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for

Rating Act,* 5 USCA 2005.* But, in any event, commencement under the Performance Act was not an irretrievable election ousting subsequent proceedings and judgment according to Lloyd-La Follette. Moreover, while the plaintiff is accurate in his charge of the omission of the notice prescribed by the Performance Act, a prosecution under Lloyd-La Follette need not satisfy the procedures of the Performance Act. *Jones* v. *Hobby*, D.C. cir. 223 F. 2d 345 (1955); *Thomas* v. *Ward*, D.C. cir. 225 F. 2d 953 (1955) *cert. den.* 350 U.S. 958; *Hoppe* v. *United States*, 136 C. Cl. 559, 565 (1956) *cert. den.* 355 U.S. 816; *Sells* v. *United States*, No. 559-57, decided this date.

There was rubrical adherence to the Lloyd-La Follette procedures. Detailed and demonstrative were the charges the agency presented, a full apprisal of the plaintiff of the deficiencies in the quality and quantity of his work during the preceding four months and more. Time to

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such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency. * * * ; and copies of the same shall be furnished upon request, to the person affected and to the Civil Service Commission. * * *

* The pertinent terms are these:

Each performance-rating plan shall provide for ratings representing at least * * * ; (2) unsatisfactory performance, which shall serve as a basis for removal from the position in which such unsatisfactory performance was rendered; * * *. No officer or employee shall be rated unsatisfactory without a ninety-day prior warning and a reasonable opportunity to demonstrate satisfactory performance.

answer was afforded initially, and then enlarged. Access to all pertinent records was granted him and ample opportunity to prepare his replies, even during working hours. Indeed, until this suit the availability of all desired records was unquestioned. A written decision followed promptly. It advised him that his responses were insufficient to refute the documented specifications of inefficiency. Surely this notice quailfied as "reasons given in writing" and of "charges sustained". 5 USCA 652(a); *Green* v. *Baughman*, D.C. cir. 243 F. 2d 610, 612 (1957) *cert. den.* 355 U.S. 819; *Hoppe* v. *United States*, *supra*, 136 C. Cl. 559.

He was allowed to appeal the agency determination through the appropriate review tribunals of the Air Force. There it was consistently approved. So, clearly, the decision to dismiss was neither hasty, nor arbitrary, nor capricious. But, more, though entitled to appeal within ten days to the Civil Service Commission from the Air Force's approval, March 4, 1957, the plaintiff did not perfect an appeal until April 23, 1957, a wait of some fifty days. The Commission declined the appeal as too late. Having neglected seasonably to pursue this administrative remedy, the plaintiff is actually not entitled to be heard here on his procedural complaints. *Bodson* v. *United States*, No. 402-56, decided March 5, 1958. Finally, his removal was Executive action, punctiliously observant of procedure, and the Court cannot review the right or wrong of it. *Keim* v. *United States*, 177 U.S. 290 (1900); *Eberlein* v. *United States*, 257 U.S. 82 (1921).

Judgment must be entered summarily on the defendant's motion, the plaintiff's motion denied, and his petition dismissed.

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*, and JONES, *Chief Judge*, concur.

UNITED STATES COURT OF CLAIMS

No. 439-57

FRANK E. MONDAY v. THE UNITED STATES

CLERK'S OFFICE

Washington, D. C., October 7, 1959

To Attorney of Record and Assistant Attorney General, and Commissioner .....

Sirs:

Please take notice that in the above-entitled cause there has been entered this day on the plaintiff's motion for rehearing the following order: OVERRULED

Very truly yours,

WILLARD L. HART
Clerk, Court of Claims